

Khaimov v Washington Hgts. Imaging Vida Women's Health Ctr.
2018 NY Slip Op 30101(U)
January 18, 2018
Supreme Court, New York County
Docket Number: 805188/17
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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LEONID KHAIMOV, Administrator of the Estate of
BELLA KHAIMOVA, and LEONID KHAIMOV,
ALEKSANDR KHAIMOV and ZINOVYI KHAIMOV,
individually, as distributees of the Estate of
BELLA KHAIMOVA,

Plaintiffs,

- v -

Index No.
805188/17

**DECISION
and ORDER**

Mot. Seq. 001

WASHINGTON HEIGHTS IMAGING VIDA
WOMEN'S HEALTH CENTER,
DENNIS ROSSI, M.D., DANIEL E. BEYDA, M.D.,
VICTORIA L. BEYDA, M.D., individually
and/or d/b/a Washington Heights Imaging
and/or Vida Women's Health Center, and
VLADIMIR MOLIVER, D.O., M.D.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Presently before the Court is Plaintiffs' motion to vacate this Court's Decision and Order dated September 28, 2017, on the grounds of excusable default and to set the issue of proper service and personal jurisdiction upon Dr. Rossi for a traverse hearing. Alternatively, Plaintiffs seek leave to re-serve Dr. Rossi. Plaintiffs also seek leave to amend the verification of the Complaint and Certificate of Merit in this action to correct the typographical error of "2015" to "2017".

Plaintiffs commenced this action for alleged medical malpractice by e-filing a Summons and Verified Complaint with the New York County Clerk's Office on May 12, 2017. Service was purportedly made on defendant, Dennis Rossi, M.D.

("Dr. Rossi") by process server Angel Gutierrez ("Mr. Gutierrez") on June 30, 2017 by delivery of the Summons and Complaint to "Alex 'C'", as a person of suitable age and discretion, at Washington Heights Imaging, 4334 Broadway, New York, New York 10033. Another copy of the Summons and Complaint was mailed to Dr. Rossi, on July 23, 2017 at that address.

Dr. Rossi interposed a Verified Answer on August 7, 2017. Included in the Verified Answer of Dr. Rossi was the affirmative defense of lack of personal jurisdiction. By Notice of Motion filed on August 9, 2017, Dr. Rossi moved for an Order dismissing the Verified Complaint pursuant to CPLR § 3211(a)(8) on the grounds that the Court lacks personal jurisdiction over Dr. Rossi because proper service was not made. Dr. Rossi stated in an affidavit that he retired from the practice of medicine effective December 31, 2014 and had not rendered medical treatment or care, been employed by, or otherwise been affiliated with Washington Heights Imaging since that date. Dr. Rossi stated that Washington Heights Imaging, located at 4334 Broadway, New York, New York 10033, was therefore not his actual place of business at the time of the purported service of process. Plaintiffs did not submit opposition to the motion. By Decision and Order dated September 28, 2017, the Court held:

Dr. Rossi's sworn affidavit that he has retired from the practice of medicine and did not conduct business at 4334 Broadway, New York, New York 10003 on June 22, 2017 is sufficient to challenge plaintiffs' process server's affidavit. Plaintiffs do not oppose Dr. Rossi's motion to dismiss for lack of personal jurisdiction based upon improper service of process, and therefore they do not challenge Dr. Rossi's assertions that service of process was improper as to him. Accordingly, Dr. Rossi's motion to dismiss is granted and the complaint is dismissed as against him.

By Notice of Motion filed on October 28, 2017, Plaintiffs presently move for an Order to vacate the September 28, 2017 Order.

A party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion. (*Lyubomirsky v. Lubov Arulin, PLLC*, 125 A.D.3d 614 [2d Dept 2015]). A claim of law office failure may be accepted as a reasonable excuse where the claim is supported by a

“detailed and credible” explanation of the default at issue. (*Henry v. Kuveke*, 9 A.D.3d 476, 479 [2d Dep’t 2004]). The determination of what constitutes a reasonable excuse for a default lies within the motion court’s discretion. (*Orimex Trading, Inc. v. Berman*, 168 A.D.2d 263 [1st Dep’t 1990]).

Plaintiffs assert law office failure as the “excusable default” for their default in opposing Dr. Rossi’s motion. Plaintiffs’ attorney Gretchyn Marino (“Marino”) submits an affidavit wherein she states that she failed to oppose the papers on behalf of her clients because she had erroneously recorded the return date of the motion as being October 11, 2017, instead of the correct date of September 11, 2017. Marino states that at the time of her calendaring error, she had been diagnosed with a life threatening aortic aneurysm and was under a high level of stress that caused her to make the error. She submits the affidavits of her doctors Lyle D. Kurtz, M.D., F.A.C.P., and Thomas Garrick, M.D, to substantiate her claim. Plaintiffs contend that Marino’s error in light of her medical diagnosis and stress constitute excusable default for their failure to oppose Dr. Rossi’s motion.

As for the merits of their claim against Dr. Rossi, Plaintiffs submit the affirmation of Petra Rietschel, M.D., Ph.D. (“Dr. Rietschel”). Dr. Rietschel avers that Dr. Rossi, among other defendants, “deviated from the accepted standard of medical care in the diagnosis and treatment of the decedent, Bella Khaimova (Mrs. Khaimova), in that they failed to timely diagnose and medically treat Mrs. Khaimova’s cancer for over 1 year, which consequently, progressed in May, 2014, to incurable extensive pelvic mesenteric, abdominal and omental adenopathy, peritoneal carcinomatosis with multiple peritoneal and omental nodules, including hepatic capsular implant, diagnosed, in May, 2014.”

As for Dr. Rossi’s claim that he was not properly served, Plaintiffs submit an affidavit from Mr. Gutierrez who states that “Alex C.” represented to him that he was authorized to accept service on behalf of Dr. Rossi and accepted service on his behalf. Plaintiffs therefore contend that a traverse hearing is warranted to determine whether proper service was made.

Dr. Rossi does not challenge Plaintiffs’ claim of excusable default or a meritorious claim. Rather, Dr. Rossi opposes those branches of Plaintiffs’ motion that seek a traverse hearing to determine the validity of service on Dr. Rossi or an extension of time to re-serve Dr. Rossi. Dr. Rossi contends that there is no issue that warrants a traverse hearing. Dr. Rossi further contends that Plaintiffs are not entitled to an extension of time to re-serve Dr. Rossi.

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]). Where defendant swears to specific facts to rebut the statements in the process server's affidavit, a traverse hearing is warranted. (*NYCTL 1998-1 Trust*, 7 A.D. 3d at 460).

CPLR § 308 authorizes personal service upon a natural person, "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business . . . of the person to be served and . . . by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .". (CPLR § 308[2]). "Personal service by way of delivery to a suitable person at a defendant's actual place of business is allowed because it is presumed that the business relationship between the deliverer and the defendant will induce the prompt redelivery of the summons to the defendant." (*Glasser v. Keller*, 567 N.Y.S.2d 981, 982 [Sup. Ct. 1991]). "[W]hen the defendant retires and vacates his or her place of business, the defendant's prior offices do not constitute the defendant's 'actual place of business' for service under CPLR § 308(2) unless defendant's acts were calculated to mislead the plaintiff as to defendant's 'actual place of business.'" (*Borges v. Entra America, Inc.*, 7 Misc.3d 1032(A), 801 N.Y.S.3d 230 [Civ. Ct., N.Y. County 2005]; see also *Continental Hosts, Ltd. v. Levine*, 170 A.D.2d 430, 565 N.Y.S.2d 222 [2d Dept 1991]).

Here, Dr. Rossi's sworn affidavit that he has retired from the practice of medicine and did not conduct business at 4334 Broadway, New York, New York 10003 on June 22, 2017 is sufficient to challenge plaintiffs' process server's affidavit. Through the affidavit of Mr. Guttierrez, Plaintiffs contend that "Alex C" represented that he was authorized to accept service on behalf of Dr. Rossi at that location. As there are issues as to whether "Alex C" was authorized to accept service on behalf of Dr. Rossi or made any representations that were calculated to mislead the plaintiffs as to Dr. Rossi's actual place of business, a traverse hearing is directed concerning whether service was properly made upon Dr. Rossi.

Based upon the foregoing, it is hereby

ORDERED that Plaintiffs' motion is granted to the extent that this Court's September 28, 2017 Order is vacated; and it is further


ORDERED that the matter is referred to a Special Referee to hold a traverse hearing with respect to service upon defendant Dr. Rossi and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing; and it is further

ORDERED that the verification of the Complaint and Certificate of Merit filed in this action are amended to correct the typographical error of "2015" to "2017."

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: January 18, 2018



Eileen A. Rakower, J.S.C.